

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
RURAL CELLULAR ASSOCIATION)	RM - 11497
)	
Petition for Rulemaking Regarding)	
Exclusivity Arrangements Between)	
Commercial Wireless Carriers and)	
Handset Manufacturers)	

To: The Commission

COMMENTS OF JIM CHEN

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SUMMARY

The purpose of my statement is to comment on the Rural Cellular Association's petition for a rule addressing exclusivity arrangements between commercial wireless carriers and handset manufacturers, and to respond to the Wireless Telecommunications Bureau's invitation for commentary on that rulemaking petition. I was retained by Cellular South, Inc. to prepare my statement.

I will begin by briefly describing exclusivity arrangements that restrict the most desirable handsets to the largest commercial wireless carriers. After noting the history of the Commission's involvement with this issue, I will argue that the Commission has the authority, either under its ordinary rulemaking powers or under its ancillary jurisdiction to ensure the effective performance of the Commission's responsibilities, to regulate handset exclusivity arrangements.

I will then address the merits of the controversy. I will argue that the Commission should abrogate all existing handset exclusivity arrangements and prospectively ban the creation of future handset exclusivity arrangements. Particularly instructive is the Commission's treatment of exclusive access arrangements affecting multiple tenant environments and multiple dwelling units. In a series of related proceedings, the Commission banned exclusive access arrangements that restricted the ability of commercial and residential tenants to choose among competing providers of multichannel video programming and telecommunications services. The Commission concluded that exclusivity in those markets limited consumer choice, diminished competition, and impeded innovation. Handset exclusivity likewise harms consumers, competition, and innovation in

the market for wireless services. The Commission should remedy those harms by banning all existing and future handset exclusivity arrangements.

COMMENTS OF JIM CHEN REGARDING EXCLUSIVITY ARRANGEMENTS BETWEEN WIRELESS CARRIERS AND HANDSET MANUFACTURERS

I. INTRODUCTION

My name is Jim Chen. I am the dean of the University of Louisville's Louis D. Brandeis School of Law. I have served as dean since January 2007. For nearly 14 years before I came to Louisville, I served as a member of the faculty of the University of Minnesota Law School. After graduating *magna cum laude* from the Harvard Law School in 1991, I clerked for Judge J. Michael Luttig of the United States Court of Appeals for the Fourth Circuit and for Associate Justice Clarence Thomas of the Supreme Court of the United States. My teaching assignments and research interests have included the law of regulated industries, administrative law, statutory interpretation, constitutional law, environmental law, and natural resources law. I have written extensively about the law of regulated industries and related legal issues, including legislative and regulatory incentives for technological change and the behavior of incumbent firms in the face of potential competition from new technologies.¹ Federal courts, including the Supreme Court of the United States, have cited my work on regulatory law.²

¹ See *Telecommunications Mergers*, in COMPETITION POLICY AND MERGER ANALYSIS IN DEREGULATED AND NEWLY COMPETITIVE INDUSTRIES, at 52-83 (Peter C. Carstensen & Susan Beth Farmer eds., Edgar Elgar Publishing 2008); *From Red Lion to Red List: The Dominance and Decline of the Broadcast Medium*, 60 ADMIN. L. REV. 793 (2008); *The Echoes of Forgotten Footballs: Telecommunications Mergers at the Dawn of the Digital Millennium*, 43 HOUSTON L. REV. 1311 (2007); *Beyond Food and Evil*, 56 DUKE L.J. 1581 (2007); *The Death of the Regulatory Compact: Adjusting Prices and Expectations in the Law of Regulated Industries*, 67 OHIO ST. L.J. 1265 (2006); *Around the World in Eighty Centiliters*, 15 MINN. J. INT'L L. 1 (2006); *Conduit-Based Regulation of Speech*, 54 DUKE L.J. 1359 (2005); *The Nature of the Public Utility: Infrastructure, the Market, and the Law*, 98 NW. U. L. REV. 1617 (2004); *Subsidized Rural Telephony and the Public Interest: A Case Study in Cooperative Federalism and Its Pitfalls*, 2 J. ON TELECOM. & HIGH TECH. L. 307 (2003); *Filburn's Legacy*, 52 EMORY L.J. 1719 (2003); *The Vertical Dimension of Cooperative Competition Policy*, 48 ANTITRUST BULL. 1005 (2003); *The Price of Macroeconomic Imprecision: How Should the Law Measure Inflation?*, 54 HASTINGS L.J. 1375 (2003); *Liberating Red Lion from the Glass Menagerie of Free Speech Jurisprudence*, 1 J ON TELECOM. & HIGH TECH. L. 293 (2002); *The Authority to Regulate Broadband Internet Access over Cable*, 16 BERKELEY TECH. L.J. 677 (2001); *Standing in the Shadows of Giants: The Role of Intergenerational Equity in Telecommunications Reform*, 71 U. COLO. L. REV. 921 (2000); *The Magnificent*

I was retained by Cellular South, Inc. to comment on the Rural Cellular Association's petition for a rule addressing exclusivity arrangements between commercial wireless carriers and handset manufacturers, *In re* Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers & Handset Manufacturers, Docket No. RM-11497, DA 08-2278 (May 20, 2008) [hereinafter *RCA Rulemaking Petition*], and to respond to the Wireless Telecommunications Bureau's invitation for commentary on that rulemaking petition, Wireless Telecommunications Bureau Seeks Comment on Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers, Docket No. DA 08-2278, 2008 WL 4567149 (Oct. 10, 2008) [hereinafter *Handset Exclusivity Rulemaking Notice*]; *see also* 73 Fed. Reg. 63,127 (Oct. 23, 2008), as subsequently amended by the Bureau's order of November 26, 2008, extending the deadline for comments to February 2, 2009, and for reply comments to February 20, 2009, *see In re* Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers, RM-11497 (Nov. 26, 2008).

I will begin by briefly describing exclusivity arrangements that restrict the most

Seven: American Telephony's Deregulatory Shootout, 50 HASTINGS L.J. 1503 (1999); *The Second Coming of Smyth v. Ames*, 77 TEX. L. REV. 1535 (1999); *Regulatory Education and Its Reform*, 16 YALE J. ON REG. 145 (1999); *TELRIC in Turmoil, Telecommunications in Transition: A Note on the Iowa Utilities Board Litigation*, 33 WAKE FOREST L. REV. 51 (1998); *The Legal Process and Political Economy of Telecommunications Reform*, 97 COLUM. L. REV. 835 (1997); *Titanic Telecommunications*, 25 SW. U. L. REV. 535 (1996); *The Last Picture Show (On the Twilight of Federal Mass Communications Regulation)*, 80 MINN. L. REV. 1415 (1996). An additional working paper, as yet unpublished, *Price-Level Regulation and Its Reform*, is available at <http://papers.ssrn.com/abstract=771226>. Most of these papers are available on my Social Science Research Network page, <http://ssrn.com/author=68651>. My complete *curriculum vitae* is available for download at <http://www.jurisdynamics.net/files/documents/JimChenCV.doc>.

²*See* *Nixon v. Missouri Municipal League*, 541 U.S. 125, 138 (2004); *WWC Holding Co. v. Sopkin*, 488 F.3d 1262, 1280 nn.3 & 6 (10th Cir. 2007) (Gorsuch, J., dissenting); *Cloverland-Green Spring Dairies, Inc. v. Pennsylvania Milk Marketing Bd.*, 462 F.3d 249, 252 (3d Cir. 2006); *MCI Telecommunications Corp. v. Public Serv. Comm'n of Utah*, 216 F.3d 929, 933 (10th Cir. 2000); *Qwest Broadband Servs., Inc. v. City of Boulder*, 151 F. Supp. 2d 1236, 1241 (D. Colo. 2001); *Wisconsin Bell, Inc. v. Public Serv. Comm'n of Wisconsin*, 27 F. Supp. 2d 1149, 1153 (W.D. Wis. 1998).

desirable handsets to the largest commercial wireless carriers. After noting the history of the Commission's involvement with this issue, I will argue that the Commission has the authority, either under its ordinary rulemaking powers or under its ancillary jurisdiction to ensure the effective performance of the Commission's responsibilities, to regulate handset exclusivity arrangements.

I will then address the merits of the controversy. I will argue that the Commission should abrogate all existing handset exclusivity arrangements and prospectively ban the creation of future handset exclusivity arrangements. Particularly instructive is the Commission's treatment of exclusive access arrangements affecting multiple tenant environments and multiple dwelling units. In a series of related proceedings, the Commission banned exclusive access arrangements that restricted the ability of commercial and residential tenants to choose among competing providers of multichannel video programming and telecommunications services. The Commission concluded that exclusivity in those markets limited consumer choice, diminished competition, and impeded innovation. Handset exclusivity likewise harms consumers, competition, and innovation in the market for wireless services. The Commission should remedy those harms by banning all existing and future handset exclusivity arrangements.

II. HANDSET EXCLUSIVITY ARRANGEMENTS

A. Advanced Handsets and the American Wireless Industry

Handset exclusivity arrangements are the outgrowth of a retailing anomaly that sets the United States apart from the rest of the industrialized world. Roughly 70 percent of mobile phones in Europe are sold independently of a wireless carrier; in some Asian

market, that figure reaches approximately 80 percent. *See* Marguerite Reardon, *Will “Unlocked Cell Phones” Free Consumers?*, CNET NEWS, Jan. 24, 2007 (available online at http://news.cnet.com/Will-unlocked-cell-phones-free-consumers/2100-1039_3-6152735.html). By contrast, between 90 and 95 percent of mobile phones in the United States are sold by carriers. *See id.* Wireless carriers in the United States often sell handsets “on a ‘buy-now-pay-later’ basis, like an installment plan, as opposed to a lump sum purchase.” Tim Wu, *Wireless Carterphone*, 1 INT’L J. COMM. 389, 399 (2007) (available online at <http://ssrn.com/abstract=962027>). The ability to subsidize the full cost of handsets “through higher monthly billing, spread over their entire customer base,” lets a major wireless carrier such as Verizon or AT&T “advertise and sell a phone for \$99-\$199 that retails without subsidies for \$300-\$600.” *Id.*³

The practice of subsidizing the initial price of a handset in exchange for subscription fees on wireless services arises from American commercial practices rather than technological necessity. As the European and Asian experience demonstrates, there is no inherent economic or technological reason for handsets and wireless carriage to fall

³The pricing of the iPhone by Apple and AT&T illustrates with some precision the value of the carrier subsidy. When the iPhone debuted in 2007, Apple departed from the standard industry practice of accepting a carrier subsidy on each phone and opted instead for a share of each new AT&T customer’s subscription fee. Lost revenues from iPhones that customers “unlocked” and then resold, often overseas, prompted Apple and AT&T to restructure iPhone prices when Apple released a new version in July 2008. iPhones were offered at \$199 or \$299, depending on memory, if purchased in connection with two-year service contracts with AT&T. Contract-free versions of the same iPhones were priced at \$599 and \$699. The subsidy attributable to the service contract is rather transparently valued at \$400. *See generally* Priya Ganapati, *Apple, AT&T Try to Plug iPhone Revenue Gap*, THESTREET.COM, July 2, 2008 (available online at <http://www.thestreet.com/print/story/10424414.html>); Peter Svensson, *AT&T offers new option of iPhone without contract*, CHI. TRIB., July 1, 2008 (available online at <http://www.chicagotribune.com/technology/sns-ap-tec-att-iphone,0,3141372.story>).

Along similar lines, Verizon Wireless recently introduced a month-to-month pricing plan that allows customers to terminate the agreement at the end of any month without paying an early termination fee. But customers who choose this month-to-month option must either buy new devices at the full retail price or use their own CDMA devices. *See In re Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, WT Docket No. 08-27, ¶ 185 (Jan. 15, 2009)

under the control of any single group. Information platforms consist of structurally and functionally distinct layers⁴ – ranging from physical infrastructure to operational logic, applications, and content – and the wireless communications industry is no exception. What is often casually called “the wireless industry” actually consists of at least four distinct layers: (1) wireless networks, (2) handsets (which after all are merely the consumer interface device of choice for mobile communications), (3) applications developed specifically for the physically constrained user environment of a typical mobile device, and (4) the content that is delivered over wireless networks and through mobile devices. In principle, each layer operates independently of the others, and there is no reason for actors who operate within one layer to control another. If anything, these technologically distinct layers tend to become the domain of actors who specialize in a single aspect of the communications industry. For instance, handset manufacturers typically do not supply content delivered to mobile devices, and neither software developers nor content providers exert much if any control over wireless networks.

There is a major exception to the general rule of structural and functional separation among the various layers of the wireless industry. For reasons of control, convenience, and profitability rather than technological compulsion, the largest American wireless carriers have become heavily involved in the design, manufacturing, and distribution of mobile devices. The resulting cluster of economic arrangements connecting handset manufacturers to wireless carriers, all traceable to these carriers’ stranglehold over handset sales, has had a profoundly negative impact on competition,

⁴See generally, e.g., Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Towards Sustainable Commons and User Access*, 52 FED. COMM. L.J. 561, 562–63 (2000); Mark A. Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925, 932 (2001); Kevin Werbach, *A Layered Model for Internet Policy*, 1 J. ON TELECOM. & HIGH TECH. L. 37, 59–65 (2002).

innovation, and consumer welfare. “By far the biggest impediment to commercialization of innovative wireless data products and services lies in the way mobile handsets are distributed in the U.S. market.” Elliott Drucker, *Handset Distribution: The Technology “Gatekeeper,”* WIRELESS WEEK, July 15, 2005, <http://www.wirelessweek.com/article.aspx?id=108928>. Neither “lack of wireless data capacity,” nor “[l]ack of uniformity among data networks,” nor “[p]oor business modeling” evidently imposes a bigger barrier to entry and innovation than the simple fact that the typical wireless carrier asserts “almost absolute control over the brands and models of handsets sold for operation on its network.” *Id.* The resulting absence of “a compelling set of applications and devices that take advantage of [wireless] broadband networks” has severely limited American consumers’ use of the mobile Internet. Rich Karpinski, *T-Mobile Captures Android Buzz*, TELEPHONY ONLINE, Sept. 23, 2008 (available online at <http://www.telephonyonline.com/wireless/news/t-mobile-android-0923/index.html>) (quoting Cole Brodman, chief technology and innovation officer for T-Mobile).

Although mobile devices can be and often are designed to work on a variety of platforms, wireless carriers wield considerable technological power in order to manipulate handsets’ interaction with their networks and even the process by which manufacturers design handsets. Carrier behavior has transmogrified the SIM card, originally designed to maximize consumer choice and service portability, into simply another tool that carriers can and do use to control subscribers through their handsets. The SIM card, in principle, is the basis by which consumers may communicate on different GSM networks. The SIM card, in practice, has become the vehicle by which

wireless carriers lock handsets into their own networks or even prevent handsets from being operated at all with any SIM card besides one provided by the carrier itself. *See* Wu, *supra*, at 400-01.⁵

Even more perniciously, wireless carriers have leveraged their control of access to their networks – and access to their millions of subscribers – into a tool by which they can steer the design of mobile devices. Manufacturers report that wireless carriers have induced them to disable a wide range of features that consumers might want, such as call timers, unlimited file transfers, and Bluetooth and WiFi capabilities. *See* Wu, *supra* at 401-04. Device crippling serves no consumer interests, but it does benefit carriers in a variety of ways. Call timers enable consumers to monitor the lengths of their calls independent of their carriers. Consumers who can readily transfer cell phone photos via e-mail or Bluetooth-enabled printer connections have no need to subscribe to wireless carriers’ proprietary-photo sharing services. And WiFi-enabled devices can make VoIP or UMA calls over 802.11 networks, thereby bypassing a wireless carrier’s network altogether. In the application layer of the industry, software developers report “application stall” as they encounter significant barriers to the creation and deployment of software for mobile devices. *See id.* at 408-14.

⁵Legal commentary on the locking and unlocking of mobile telephones is extensive. *See generally, e.g.*, Daniel J. Corbett, *Would You Like That iPhone Locked or Unlocked? Reconciling Apple’s Anticircumvention Measures with the DMCA*, 8 U. PITT. J. TECH. L. POL’Y 8 (2008); John Haubenreich, *The iPhone and the DMCA: Locking the Hands of Consumers*, 61 VAND. L. REV. 1507 (2008); Neil Weinstock Netanel, *Temptations of the Walled Garden: Digital Rights Management and Mobile Phone Carriers*, 6 J. TELECOM. & HIGH TECH. L. 77 (2007); Andrew Greenhaigh, Student Article, *iCompete: Analyzing Vendor-Exclusive Smartphone Tying Arrangements Under Federal Law*, 20 LOY. CONSUMER L. REV. 438 (2008); Tate Michael Keenan, Note, *A Key to Unlocking Your iPhone: Eliminating Wireless Service Providers’ Use of United States Copyright Law to Limit Consumer Choice and Provider Competition*, 43 GA. L. REV. 229 (2008). The Copyright Office has declared that consumers may unlock phones without violating the anticircumvention provisions of the Digital Millennium Copyright Act. *See* Library of Congress, Copyright Office, *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, 71 Fed. Reg. 68,472 (Nov. 27, 2006). The Copyright Office’s declaration, however, has no bearing on whether the largest wireless carriers’ locking of mobile devices is lawful in the first place.

Today's most advanced "mobile phones . . . not only look like minicomputers, they act like them too." Laura M. Holson, *Mobile Phone Industry Takes Aim at the iPhone*, N.Y. TIMES, April 4, 2008 (available online at <http://www.nytimes.com/2008/04/04/technology/04phone.html>). The emergence of powerful, cutting-edge mobile devices such as Apple's iPhone, the LG Voyager, and the Samsung Instinct has prompted the nation's largest wireless carriers to craft handset exclusivity arrangements that effectively force consumers who want these "smartphones" to subscribe to those carriers' wireless services. Verizon Wireless, for instance, is the exclusive vendor of the LG Voyager, and only AT&T subscribers can get the iPhone. Sprint Nextel rolled out the Samsung Instinct, under an exclusive arrangement, to meet the new demand for multimedia features and a touchscreen interface. See Rob Pegoraro, *It Only Looks like an iPhone*, WASH. POST., July 3, 2008, at D1. T-Mobile, the nation's fourth largest carrier, has introduced the G1, a phone "built by HTC, running on T-Mobile's network, and heavily preloaded with Google applications" optimized for Google's 3G Android operating system. Karpinski, *supra*; see also Jessica E. Vascellaro & Wei Yi Lim, *T-Mobile's Google-Based Phone Nears*, WALL ST. J., Sept. 16, 2008. Manufacturers seeking to challenge Research in Motion and Apple in the smartphone market typically do so in connection with an exclusive distribution arrangement with a large carriers. Motorola's experience in this regard is instructive. See Rajani Baburajan, *New Offerings from Verizon Wireless and Motorola*, TMCNET, Oct. 6, 2008; Kent German, *Moto spills new models for Verizon, AT&T*, CNET NEWS, Oct. 6, 2008; *Motorola introduces touchscreen phone*, WASH. POST, Oct. 14, 2008. Although Dell has expressed an interest in making its own smartphone, it and other "computer makers face

obstacles in entering the phone market,” including the perceived need to “reach[] a distribution deal with a cellular carrier.” Justin Scheck & Yukari Iwatani Kane, *Dell Prepares to Dial Into Smartphone Marketplace*, WALL ST. J., Jan. 30, 2009 (available at http://online.wsj.com/article_email/SB123327385680231133-1MyQjAxMDI5MzMzMzMDIzNzAzWj.html); *see also* Shlee Vance & Matt Richtel, *Smartphone From Dell? Just Maybe*, N.Y. TIMES, Jan. 30, 2009 (available at <http://www.nytimes.com/2009/01/31/technology/31phone.html>) (observing how advanced handheld " devices could open opportunities for PC companies, weighted down by low margins, *to team up with telecommunications companies* on profitable business and media services" (emphasis added)).

In short, exclusivity arrangements now dominate the marketplace for advanced handsets. Eight of the ten most popular handsets in November 2008 were handcuffed by an exclusivity arrangement to a single carrier. *See* Kristen Beckman, *By the Numbers: Top 10 Most Popular U.S. Handsets in October*, RCR WIRELESS, Jan. 8, 2009 (available online at <http://www.rcrwireless.com/article/20090108/wireless/901079989/1081/newsletter33>).

B. The Rise of Handset Exclusivity Arrangements Has Triggered a Decline in Competition, Innovation, and Consumer Welfare

Exclusivity arrangements that restrict the most highly coveted mobile devices to specific carriers represent the most recent way in which nationwide wireless carriers have leveraged the sheer size of their subscriber bases into a clutch of oligopsonistic and highly undesirable practices. Restricting advanced handsets to specific carriers is an anticompetitive practice that harms the markets for mobile devices, handset-friendly

software applications, and wireless carriage itself. Handset exclusivity steers subscribers away from the nationwide carriers' competitors, not on the basis of price or service, but strictly on access to devices that would be available through other vendors (including unaffiliated equipment dealers as well as competing wireless service providers) in a market not distorted by the large carriers' oligopsonistic dominance of the market for handsets. The elimination of competition for the handsets raises those devices' prices. In turn, carriers with handset exclusivity arrangements recover higher device prices through higher subscription fees. As competition retreats and the leading carriers magnify their market power under the cover of those exclusivity arrangements, rival carriers lose the ability to discipline rates and motivate innovation throughout the industry.

In addition, arrangements that commit equipment manufacturers to design smartphones for a single purchaser reduce each manufacturer's incentive to develop innovative features that would optimize consumer value across wireless networks. Instead, manufacturers affirmatively disable features that consumers would value (crippled data transmission, incomplete or totally absent implementation of 802.11 WiFi capacity, and the like), in favor of design elements that increase subscribers' dependence on their wireless providers' networks and demand for these providers' premium services. The Samsung Instinct, for example, notoriously lacks a WiFi receiver and, as a result, effectively locks Sprint Nextel subscribers into depending on that carrier's mobile network. *See Pegoraro, supra*, at D1. The contrast between Nokia's e61 and e62 handsets is also instructive. The e61 was marketed outside the United States; the e62 was sold in this country on an exclusive arrangement with Cingular. Because Nokia gave the e61 WiFi capacities, "it can do lots of things without having to connect to a cellular

phone network.” Gary Krakow, *Nokia e62: The best smartphone ever?*, MSNBC.COM, Aug. 24, 2006 (available online at <http://www.msnbc.msn.com/id/14456766>). By contrast, because “[w]hat some carriers fear most is the e61’s ability to handle VoIP calls when you’re near a friendly wireless network,” analysts recognized that consumers “won’t see Wi-fi on the e62.” *Id.*; see also Lisa Gade, *Product review of Nokia E62*, MOBILE TECH REVIEW, Oct. 4, 2006 (available online at <http://www.mobiletechreview.com/phones/Nokia-E62.htm>) (“The E61 is one of our favorite smartphone/PDA phone devices, and the E62 is also near the top of our list. *Had Cingular left WiFi intact, the phone would've earned another half star.*” (emphasis added)). To recount all of this misery is to say nothing of the substantial (if virtually unquantifiable) deadweight loss incurred by would-be developers of software crafted specifically to operate on advanced handheld devices.

This state of affairs demands the Commission’s intervention. Unfettered market forces are unlikely to remedy practices that have arisen in the absence of regulatory attention. More than a decade ago, the Commission presciently recognized that “[t]he cost of a . . . handset – as a component of the cost of switching providers – may . . . undermine market discipline” among wireless carriers. *In re Personal Communications Indus. Association’s Broadband Personal Communications Servs. Alliance’s Petition for Forbearance for Broadband Personal Communications Servs.*, 13 FCC Rcd. 16,857, 16,869 (1998) [hereinafter *PCS Forbearance Petition*]. Thanks to handset exclusivity arrangements, the rising cost of handsets gives nationwide carriers even stronger incentive to subsidize handsets through higher subscription fees and to lock down subscribers more firmly than ever.

If anything, the handsets that consumers demand most strongly are simply unavailable elsewhere, and the nationwide carriers have taken aggressive steps to prevent those phones from operating on any other network. The exclusion of the iPhone from broad swaths of the United States illustrates this phenomenon. Thanks to an exclusivity arrangement confining the iPhone to AT&T, consumers in Alaska, Arizona, Colorado, Idaho, Kansas, Maine, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, South Dakota, Utah, Vermont, West Virginia, and Wyoming have little or no access to the most coveted smartphone in today's marketplace.⁶ Alaska residents who tried to buy the iPhone out-of-state – initially AT&T provided only roaming service in Alaska and operated no retail outlets there – had their service canceled under contractual terms requiring subscribers to live in a community served directly by AT&T and to spend no more than 40 percent of their minutes roaming on non-AT&T networks. *See No iPhone for Alaska? Rural cell phone group asks FCC to act*, ARS TECHNICA (May 21, 2008) (available online at <http://arstechnica.com/old/content/2008/05/no-iphone-for-alaska-rural-cell-phone-group-asks-fcc-to-act.ars>). *See generally, e.g.,* Jeffrey Silva, *Rural carriers bemoan exclusivity deals on handsets*, RCR Wireless News (May 20, 2008) (listing exclusivity arrangements confining certain advanced handsets to the nation's largest wireless carriers). AT&T's acquisition of Dobson Communications Corporation, *see* Applications of AT&T Inc. & Dobson Communications Corp. for Consent to Transfer Control of Licenses and Authorizations, 22 FCC Rcd. 20,295 (2007),

⁶Although there are now “four mobile telephone operators in the United States that analysts typically describe as “nationwide,” that designation does not mean that service from a particular carrier is available in any specific community in the United States. *In re* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, WT Docket No. 08-27, ¶ 14 (Jan. 15, 2009). “When an operator is described as being nationwide, it does not necessarily mean that the operator's license areas, service areas, or pricing plans cover the entire land area of the United States.” *Id.*

alleviated the effects of iPhone exclusivity for some but not all parts of Alaska. It remains striking that it took the elimination of an independent wireless carrier to bring the iPhone to any part of Alaska. Handset exclusivity arrangements continue to leave significant parts of that state, and rural America at large, on the losing end of a new digital divide.

Against the nationwide carriers and the equipment manufacturers drawn into their orbit by the sheer gravity of those carriers' subscriber bases, competing carriers have no effective recourse. This is especially true of smaller and rural carriers. In a market in which three providers (Verizon Wireless, AT&T, and Sprint Nextel) command more than three-quarters of all wireless telephone subscribers in the United States, *see In re Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, WT Docket No. 08-27, ¶ 14 & Appendix A, Table A-4 (Jan. 15, 2009) (reporting mobile telephone company subscribers by company as of December 31, 2007) [hereinafter *13th CMRS Competition Report*]; *In re Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 23 FCC Rcd. 2241, 2256 (2008) (chart 1, reporting mobile telephone subscribers by company as of December 31, 2006) [hereinafter *12th CMRS Competition Report*], even the combined purchasing power of industry consortiums such as the Associated Carrier Group, LLC, does not approach that of the nationwide carriers.

Furthermore, the largest carriers' advertising budgets dwarf those of small and rural carriers, even if those carriers could coordinate their marketing efforts. Much of the leading carriers' advertising is directed at consumers who seek an advanced, multimedia-capable handset and will tailor their choices among wireless service providers

accordingly. Left unchecked, the largest carriers' manipulation of handset exclusivity arrangements will inexorably push the wireless industry toward a decidedly less competitive landscape, one containing no more than four carriers in total, with few if any competitive choices in rural and high-cost communities. Advanced handsets have such economic significance that the Justice Department cited the "competitive effects" of "mobile broadband devices" in its decision to permit the merger of XM and Sirius. Statement of the Department of Justice Antitrust Division on its Decision to Close its Investigation of XM Satellite Radio Holdings Inc.'s Merger with Sirius Satellite Radio Inc., March 24, 2008 (available online at http://www.usdoj.gov/opa/pr/2008/March/08_at_226.html); *see also* Applications for Consent to the Transfer of Control of Licenses XM Satellite Radio Holdings Inc., Transferor to Sirius Satellite Radio Inc., Transferee, 23 FCC Rcd. 12,348 (2008). That the Justice Department would permit the merger of the nation's only satellite radio service providers, thereby creating a monopoly over an entire communications medium, testifies to the extraordinary power of advanced mobile devices. *Cf.* Jim Chen, *From Red Lion to Red List: The Dominance and Decline of the Broadcast Medium*, 60 ADMIN. L. REV. 793, 800 (2008) (available online at <http://ssrn.com/abstract=1219382>) ("The emergence of 3G handheld devices capable of receiving Internet radio minimizes the regulatory harm that might otherwise emerge from permitting a monopoly over satellite radio." (footnote omitted)).

Smartphones such as Apple's iPhone now represent the point of entry for many consumers into wireless telephony and advanced information services. As I described in Part II.A., *supra*, carriers and manufacturers are fiercely fighting to stay atop the crest of

consumer demand for the most sophisticated handsets. This frenzied scrambling belies the CTIA's assertion that 35 companies have manufactured 620 unique wireless devices for the American market. *See* Christopher Guttman-McCabe, *Written Ex Parte Communication*, WT Docket No. 08-27, RM-11361 (March 20, 2008). In a twist on a classic pair of acronyms in telecommunications law, the battle between POTS and PANS has arisen anew. Consumer preferences have decisively tilted in favor of pretty amazing new smartphones over plain old telephone sets. "More than two-thirds of those questioned said they had chosen their phone on the basis of its music-playing capabilities, compared to 49 per cent last year. And the growing importance of emailing and surfing the web on the move was reflected in the fact that 30 per cent of handsets sold in the US during the third quarter had a physical Qwerty key board, compared to just 11 per cent in 2007." Claudine Beaumont, *Apple iPhone 3G biggest selling handset in US*, THE TELEGRAPH, Nov. 11, 2008. For the first quarter of fiscal year 2009, Apple reported the sale of 4,363,000 iPhones, an increase of 88 percent relative to the first quarter of the previous fiscal year.

Mobile broadband is becoming a viable substitute for (or at least complement to) other ways of browsing the Internet: "'smartphone' users spend an average of four hours and 38 minutes per month browsing the mobile Web in the United States, " reflecting a recent "increase of 89 percent year over year." *13th CMRS Competition Report, supra*, at ¶ 211. Text messages as well as multimedia messages more than doubled in volume from 2006 to 2007. *See id.* at ¶ 210. In certain rural areas, mobile substitution takes on even greater significance. In "areas where telephone customers are dispersed and terrain is unaccommodating," *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 617 (5th Cir.

2000), wireless carriers' 3G networks often provide the sole source of broadband access. In these markets, smartphones play an especially important role in providing "[a]ccess to advanced telecommunications and information services." 47 U.S.C. § 254(b)(2). Handset exclusivity arrangements, especially in markets not served by the nominally "nationwide" carriers that wield these arrangements, *see supra* note 6 and accompanying text, therefore cripple or eliminate the broadband access mechanism that many rural consumers would choose.

In all markets, across the country, the "sea change in the mobile device market" has become "impossible to deny": "The device of the future is the smartphone, and it will likely replace millions of cell phones at the low end of the sophistication scale, and laptop computers at the high end." Richard Martin, *Cell Phones Face Extinction as Smartphones Take Over*, INFORMATION WEEK, April 1, 2008 (available online at <http://www.informationweek.com/story/showArticle.jhtml?articleID=207000858>).

Carriers confined to offering low-end phones are decidedly disadvantaged in this competitive landscape.

C. The Commission's Experience with Handset Exclusivity Arrangements

The Commission has already demonstrated its awareness of handset exclusivity arrangements and their anticompetitive potential. The Commission has recognized how wireless carriers use handset exclusivity – alongside exclusive access to premium content and early termination fees – to limit the ability of their subscribers to switch service providers. See *12th CMRS Competition Report*, 23 FCC Rcd. at 2319. The Commission has also observed how carriers are trying to compete with AT&T by "press[ing] their

equipment manufacturers” to emulate iPhone features such as touchscreen typing. *13th CMRS Competition Report, supra*, at ¶ 164. In a less regimented world, the innovative spur would not arise from the carriers, but rather from the manufacturers themselves, who after all represent the layer of the industry that specializes in developing devices. Handset manufacturers, unencumbered by exclusivity arrangements, would invent new devices and give both carriers and customers a chance to choose among input interfaces and advanced features across a wider variety of models. Handset exclusivity and availability became an issue in the Commission’s recent approval, with conditions, of the Verizon-ALLTEL merger. *See In re Cellco Partnership d/b/a Verizon Wireless & Atlantis Holdings LLC*, WT Docket No. 08-95, 208 WL 4876046 (Nov. 4, 2008) [hereinafter *Verizon-ALLTEL Order*]. Commenters on the Verizon-ALLTEL merger urged the Commission to review issues of handset exclusivity and access in connection with the merging parties’ petition for approval of their transaction. At their simplest level, handset exclusivity arrangements prevent the nationwide carriers’ competitors, especially smaller and rural wireless providers, from offering some of the most coveted smartphones to their subscribers. Commenters also informed the Commission of handset exclusivity’s negative impact on manufacturers, who would face an even more powerful oligopsony upon the merger of ALLTEL into Verizon. Mindful of these exclusivity arrangements’ negative impact on competition and the public interest, commenters urged the Commission to condition its approval of the transaction on the merged entity’s waiver of exclusivity arrangements with handset manufacturers. *See id.* ¶ 182.

In the *Verizon-ALLTEL Order*, the Commission found that the proposed prohibition on “exclusive handset contracts . . . are more appropriate for a rulemaking

proceeding where all interested parties have an opportunity to file comments.” *Id.* ¶ 185. It referred a discussion of handset exclusivity arrangements and their harms to the “general proceeding” announced in the Wireless Telecommunications Bureau’s *Handset Exclusivity Rulemaking Notice*, *supra*. This paper answers that invitation.

Handset exclusivity arrangements between mobile device manufacturers and wireless carriers have a wide range of anticompetitive, discriminatory effects on consumer welfare and the national interest in competition and technological innovation in all facets of the wireless industry. These arrangements fall within the jurisdictional reach and regulatory responsibility of the Federal Communications Commission. The Commission should ban the enforcement of existing handset exclusivity arrangements and the execution of new arrangements. In the balance of my paper, I will identify the multiple bases of the Commission’s power to prohibit handset exclusivity. Drawing upon the Commission’s experience with exclusivity arrangements affecting multichannel video program delivery and telecommunications service in multiple tenant environments, I will also outline the substantive basis for a rule that abrogates all existing handset exclusivity arrangements and bans future agreements of this kind.

III. THE COMMISSION’S POWER TO REGULATE HANDSET EXCLUSIVITY ARRANGEMENTS

“The Commission has broad authority to protect U.S. customers from harms resulting from anti-competitive behavior.” *In re Saskatchewan Telecommunications*, 22 FCC Rcd. 91, 96 n.42 (2007). The Commission derives its power and responsibility to ban handset exclusivity arrangements from sections 1, 4, 201, 202, 254, 303, 307, and 332 of the Communications Act. In addition to these ordinary sources of rulemaking

authority, the Commission may also ban handset exclusivity arrangements under its ancillary jurisdiction to ensure the effective performance of the Commission's responsibilities. I will address each of these issues in turn.

A. Ordinary Rulemaking Authority

Numerous provisions of the Communications Act enable the Commission to regulate handset exclusivity. By virtue of section 332(c)(1)(A) of the Act, every wireless carrier is subject to the common carrier and antidiscrimination provisions of title II: "A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this chapter, except for such provisions of subchapter II of this chapter as the Commission may specify by regulation as inapplicable to that service or person." 47 U.S.C. § 332(c)(1)(A). Quite notably, the Commission's power under section 332 to forbear from the application of these common carrier provisions to wireless service providers does *not* extend to "any provision of section 201 [or] 202." *Id.*; *see also PCS Forbearance Petition*, 13 FCC Rcd. at 16,865; *cf. In re Implementation of Sections 3(n) and 332 of the Communications Act*, 9 FCC Rcd. 1411, 1461 (1994) (observing that treating PCS as a commercial mobile radio service subject to sections 201, 202, and 208 via section 332 would advance the universal availability of PCS by obliging PCS licensees to offer their services to the public at nondiscriminatory rates).

Sections 201 and 202 of the Act "codify[] the bedrock consumer protection obligations of a common carrier." *PCS Forbearance Petition*, 13 FCC Rcd. at 16,865. Section 201 declares: "All charges, practices, classifications, and regulations for and in

connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful” 47 U.S.C. § 201(b). Thanks to its explicit coverage of “practices, classifications, and regulations” as well as “charges,” section 201 readily reaches the formation and enforcement of handset exclusivity arrangements. Moreover, the largest wireless carriers’ common practice of bundling discounted handsets with subscriptions for service brings the entire transaction within the reach of the Commission’s jurisdiction over common carriers’ “charges.” From the consumer’s perspective, the overall price of wireless service includes the price of the handset that she or he can obtain from no other vendor besides the carrier. Indeed, in light of these carriers’ practice of subsidizing handset sales by recouping the devices’ cost through higher rates charged to the subscriber base as a whole, the impact of this practice on the cost of wireless service – independent of any impact on competition in the wireless industry or on innovation in equipment manufacturing or software development – suffices to bring handset exclusivity within the Commission’s section 201 power to regulate carriers’ “charges.” This conclusion is entirely consistent with (and arguably is dictated by) the Commission’s 2008 *Telecommunications Nonexclusivity Order*, the third of a trilogy of orders against exclusive dealing discussed in Part IV.B, *infra*.

Section 202 makes it “unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any

particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.” 47 U.S.C. § 202(a). Section 202’s antidiscrimination mandate extends to all forms of “unjust or unreasonable discrimination,” whether direct or indirect, accomplished by whatever “means or device,” and protects not only “persons” but also “class[es] of persons” and “localit[ies]” against “any undue or unreasonable prejudice or disadvantage.” In concert, “these provisions prohibit unreasonable discrimination by common carriers by guaranteeing consumers the basic ability to obtain telecommunications service on no less favorable terms than other similarly situated customers.” *PCS Forbearance Petition*, 13 FCC Rcd. at 16,865. “Consistent with [these provisions’] centrality . . . to consumer protection,” sections 201 and 202 “apply equally to dominant and non-dominant carriers.” *Id.* at 16,866. As a result, the Commission need not find market power before discharging its responsibility to enforce these statutory mandates. *Id.*; *see also* Motion of AT&T Corp. to Be Reclassified as a Non-Dominant Carrier, 11 FCC Rcd. 3271, 3282 (1995). What matters is not market power, but the presence of or potential for unjust, unreasonable, or discriminatory conduct. *See PCS Forbearance Petition*, 13 FCC Rcd. at 16,868-89.

When Congress applied sections 201 and 202 to wireless carriers through section 332, it codified those common carrier provisions’ commitment to geographic parity among consumers of communications services. Congress intended to “foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure.” H.R. REP. NO. 103-111, 103d Cong., 1st Sess. 260 (1993). Accordingly, the Commission has observed that federal communications law should not be interpreted or implemented so

that “consumers receiv[e] differing levels of service and protection depending on the jurisdiction in which they live.” *PCS Forbearance Petition*, 13 FCC Rcd. at 16,872.

Other provisions of the Communications Act reinforce the requirement of just, reasonable, and nondiscriminatory conduct codified in sections 201 and 202. Section 1 declares that the Act and the Commission have the purpose of “mak[ing] available, so far as possible, to *all the people* of the United States ... a rapid, efficient, Nation-wide, and world-wide radio communication service with adequate facilities at reasonable charges.” 47 U.S.C. § 151 (emphasis added). That provision not only creates the Commission but also directs it to “execute and enforce the provisions” of the Act. *Id.* “Congress has delegated to the Commission the authority to ‘execute and enforce’ the Communications Act, [47 U.S.C.] § 151, and to ‘prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions’ of the Act, § 201(b).” *National Cable & Telecom. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). As if that mandate did not suffice, section 307 further directs the Commission to distribute “licenses, frequencies, hours of operation, and . . . power among the several States and communities [so] as to provide a *fair, efficient, and equitable distribution* of radio service.” 47 U.S.C. § 307(b) (emphasis added).

Moreover, section 254 counsels aggressive regulation of handset exclusivity arrangements or any other form of carrier conduct that might undermine “the preservation and advancement of universal service.” 47 U.S.C. § 254(b). All three of the three universal service principles articulated in section 254 support a ban on handset exclusivity:

1. “Quality services should be available at *just, reasonable, and affordable* rates.”

2. “Access to advanced telecommunications and information services should be provided *in all regions of the Nation.*”
3. “Consumers in all regions of the Nation, *including low-income consumers and those in rural, insular, and high cost areas,* should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.”

47 U.S.C. § 254(b)(1-3) (emphases added). These universal service principles express goals of parity across geographic, demographic, and economic lines that pervade the entire Communications Act. *See generally* Jim Chen, *Subsidized Rural Telephony and the Public Interest: A Case Study in Cooperative Federalism and Its Pitfalls*, 2 J. ON TELECOM. & HIGH TECH. L. 307, 342-46 (2003). The Commission is particularly “committed to establishing policies and rules that will promote service to all regions in the United States, particularly to traditionally underserved areas, such as Alaska and Hawaii, and other remote areas.” *In re* Policies & Serv. Rules for Broadcasting-Satellite Serv., 22 FCC Rcd. 8840, 8860 (2007). The Commission has manifested its dedication to parity between rural and urban consumers on many occasions, not least when it recently ordered wireless carriers “to facilitate reasonable roaming requests . . . on behalf of wireless customers, particularly in rural areas,” in light of growing barriers that made it “more difficult for small and rural carriers to obtain access to nationwide carriers’ networks through automatic roaming agreements.” *In re* Reexamination of Roaming

Obligations of Commercial Mobile Radio Serv. Providers, 22 FCC Rcd. 15,817, 15,828 (2007) [hereinafter *Automatic Roaming Order*].

The entire fabric of the Communications Act favors competition, combats discrimination, and promotes innovation. The preamble to the Telecommunications Act of 1996 pledged, among other things, to “secure lower prices and higher quality services . . . and encourage the rapid deployment of new telecommunications technologies.” Pub. L. No. 104-104, 110 Stat. 56, 56. Numerous statutory provisions instruct the Commission “to promote . . . policies and purposes . . . favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity.” 47 U.S.C. § 257(b). The Communications Act directs the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.” 47 U.S.C. § 157 note.

The Commission gives legal voice to these statutory aspirations through its public interest evaluation, perhaps the most frequently repeated exercise in the Commission’s regulatory repertoire. That evaluation includes a “competitive analysis” that “is informed by, but not limited to traditional antitrust principles.” *In re News Corp. & DirecTV Group, Inc.*, 23 FCC Rcd. 3265, 3278 (2008). Unlike the Antitrust Division of the Department of Justice, which confines its reviews under section 7 of the Clayton Act (15 U.S.C. § 18) “solely to an examination of . . . competitive effects, without reference to diversity, localism, or other public interest considerations,” the Commission “is

charged with determining” the full contours of “the broader public interest.” *News Corp. & DirecTV*, 23 FCC Rcd. at 3278. See generally Jim Chen, *The Echoes of Forgotten Footfalls: Telecommunications Mergers at the Dawn of the Digital Millennium*, 43 HOUSTON L. REV. 1311, 1318-23 (2007). Because competition “[i]n the communications industry . . . is shaped not only by antitrust law, but also by the regulatory policies that govern the interactions of industry players,” *News Corp. & DirecTV*, 23 FCC Rcd. at 3278, “[t]he Commission’s public interest evaluation necessarily encompasses the ‘broad aims of the Communications Act, which include, among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets; accelerating private sector deployment of advanced services; ensuring a diversity of information sources and services to the public; and generally managing the spectrum in the public interest,” *id.* at 3277-78 (footnotes omitted); see also *In re AT&T Wireless Servs., Inc. & Cingular Wireless Corp.*, 19 FCC Rcd. 21,522, 21,544 (2004); *In re Comcast Corp. & AT&T Corp.*, 17 FCC Rcd. 23,246 23,255 (2002); *In re MediaOne Group, Inc. & AT&T Corp.*, 15 FCC Rcd. 9816, 9821-22 (2000); *In re MCI Communications Corp. & WorldCom, Inc.*, 13 FCC Rcd. 18,025, 18,031 (1998).

Critically, the Commission’s “public interest analysis . . . also entail[s] assessing whether a transaction will affect the quality of telecommunications services or will result in the provision of new or additional services to consumers.” *News Corp. & DirecTV*, 23 FCC Rcd. at 3278; see also, e.g., *AT&T & Cingular*, 19 FCC Rcd. at 21,544. This portion of the public interest inquiry “consider[s] technological and market changes, and the nature, complexity, and speed of change of, as well as trends within, the communications industry.” *News Corp. & DirecTV*, 23 FCC Rcd. at 3278. In assessing

the impact on existing and future competition, the Commission must vigilantly explore all the ways in which a transaction or practice may “create market power, create or enhance barriers to entry by potential competitors, or create opportunities to disadvantage rivals in anticompetitive ways.” *Id.* at 3279.

The Communications Act gives the Commission ample power to carry out all of these statutory mandates. Section 4 of the Act gives the Commission broad power to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.” 47 U.S.C. § 154(i). The Act specifically empowers the Commission, in furtherance of “public convenience, interest, or necessity,” to “[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of” title III. 47 U.S.C. § 303(r); *accord, e.g., City of New York v. FCC*, 486 U.S. 57, 70 n.5 (1988) (noting that the Commission has “broad rulemaking power ‘as may be necessary to carry out the provisions of this chapter’”); *United Video, Inc. v. FCC*, 890 F.2d 1173, 1182-83 (D.C. Cir. 1989); *News Corp. & DirecTV*, 23 FCC Rcd. at 3279. In accordance with the Commission’s regulation enabling “[a]ny interested person” to “petition for the issuance, amendment or repeal of a rule or regulation,” 47 C.F.R. § 1.401(a), the Rural Cellular Association has requested a rulemaking proceeding on handset exclusivity arrangements, *see RCA Rulemaking Petition, supra*, and the Wireless Telecommunications Bureau has invited comments in response to that petition, *see Handset Exclusivity Rulemaking Notice, supra*. The Commission has ample authority under multiple statutory provisions to craft a rule that addresses the problems that handset exclusivity poses for wireless communications.

B. Ancillary Jurisdiction

In addition to relying on its express rulemaking powers, the Commission may invoke its ancillary jurisdiction in order to issue a rule regarding handset exclusivity arrangements. The Commission may assert ancillary jurisdiction whenever (1) the Communications Act “gives the Commission subject matter jurisdiction over the service to be regulated and (2) the assertion of jurisdiction is ‘reasonably ancillary to the effective performance of [the Commission’s] responsibilities.’” *In re IP-Enabled Servs.*, 20 FCC Rcd. 10,245, 10,262 (2005) (quoting *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968)). Ancillary jurisdiction gives the Commission “authority to promulgate regulations to effectuate the goals and provisions” of the Communications Act “even in the absence of explicit statutory authority.” *In re Exclusive Serv. Contracts for Provision of Video Servs. in Multiple Dwelling Units & Other Real Estate Devs.*, 22 FCC Rcd. 20,235, 20,260 (2007).

Ancillary jurisdiction is a powerful tool that the Commission can use and has used to adopt innovative, productive regulatory policies. Successful invocations of ancillary jurisdiction have enabled the Commission to monitor or even to anticipate significant developments in communications by wire or radio and to devise responsive regulations, in some instances before Congress conferred explicit statutory authority on the Commission. Ancillary jurisdiction supported the Commission’s initial efforts to regulate cable television systems, establish a universal service fund, to impose E911 requirements on interconnected VoIP providers, and to patrol the industry that would eventually provide what the contemporary Communications Act calls “information

services” – all before Congress explicitly authorized the Commission to take these actions. *See Southwestern Cable*, 392 U.S. at 177-78 (cable); *Rural Tel. Coalition v. FCC*, 838 F.2d 1307, 1315 (D.C. Cir. 1988) (universal service); *IP-Enabled Servs.*, 20 FCC Rcd. at 10,262-66 (VoIP E911); *GTE Serv. Corp. v. FCC*, 474 F.2d 724, 731 (2d Cir. 1973) (“computer services”).

I have already detailed the elaborate, interlocking statutory framework by which the Commission may assert explicit jurisdiction over handset exclusivity arrangements between wireless carriers and equipment manufacturers. The Commission’s explicit statutory powers readily cover contractual arrangements that restrict consumer access to smartphones, undermine competition in the market for wireless services, and suffocate innovation in the development of software for handheld devices. Even if these arrangements are construed to fall outside a very narrowly construed definition of services subject to the Commission’s explicit authority, ancillary jurisdiction would support a rule against handset exclusivity arrangements. In past controversies involving retransmission of broadcast signals over cable systems, the establishment of a universal service fund, the imposition of E911 obligations on VoIP providers, and the nascent framework for regulating the information services industry, the Commission has successfully relied on its ancillary jurisdiction. The Commission likewise enjoys ancillary jurisdiction over handset exclusivity arrangements.

Both elements of ancillary jurisdiction are present. First, contractual arrangements restricting consumer access to handsets fall within the scope of the Commission’s authority and responsibility to regulate commercial mobile services. Second, the use of this authority to eliminate handset exclusivity arrangements in the

wireless industry would, at a minimum, be reasonably ancillary to the Commission's performance of its responsibility to ensure just, reasonable, nondiscriminatory, and geographically equitable prices and practices in the provision of wireless service. Although the Commission has ample explicit authority to regulate handset exclusivity arrangements, it may also rely on its ancillary jurisdiction. In its pivotal order banning exclusivity clauses restricting video service providers' access to tenants in multiple dwelling units, discussed at length in Part IV.B, *infra*, the Commission invoked its ancillary jurisdiction in addition to its explicit rulemaking authority. *See In re Exclusive Serv. Contracts for Provision of Video Services in Multiple Dwelling Units & Other Real Estate Devs.*, 22 FCC Rcd. 20,235, 20,260-61 (2007) [hereinafter *Video Nonexclusivity Order*]. As a matter of jurisdiction and as a matter of the substantive regulatory standards that it should apply, the Commission should follow the path it has already blazed in its 2007 *Video Nonexclusivity Order*.

IV. THE COMMISSION SHOULD PROHIBIT HANDSET EXCLUSIVITY ARRANGEMENTS

A. The Public Interest Supports a Ban on Handset Exclusivity

Handset exclusivity undermines competition on multiple levels in the market for wireless services. The nationwide carriers' exclusivity arrangements raise the overall price paid by many consumers for wireless services and for the handsets that they use in connection with those services. Because consumers give weight to the availability of particular handsets and to the switching costs that would accompany the decision to subscribe to a different carrier, handset exclusivity arrangements are inflicting severe damage on competition among wireless service providers. These arrangements are also

stifling device manufacturers and software developers.

Collusion between handset manufacturers and large wireless carriers is undermining an industry that otherwise faces few if any structural or behavior barriers to competition. Across all layers, from carriage to devices, applications, and content, competition within the wireless communications industry could be truly robust. Rural wireless carriers have already demonstrated their willingness and ability to compete with national carriers where the playing field is level. Rural carriers deliver reasonably priced, high quality services to the nation's least densely populated markets. Indeed, before the proliferation of handset exclusivity agreements, the Commission found that "CMRS providers are competing effectively in rural areas." *12th CMRS Competition Report*, 23 FCC Rcd. at 2291. "[R]ural providers are rolling out competitive national pricing plans," typically perceived by their customers as "competitive with those offered by national providers." *Id.* No less than their urban counterparts, "providers in rural markets . . . are investing in expanding network capacity to deliver voice and advanced wireless services to consumers in rural areas and tribal lands." *Id.* at 2290. By contrast, handset exclusivity arrangements threaten to distort and destroy this competitive environment by enabling nationwide carriers to raise prices, throttle competition, and suffocate innovation throughout the industry through the erection of artificial barriers that rural carriers simply cannot overcome through ordinary competitive channels. These arrangements merit close regulatory scrutiny and deserve ultimately to be banned.

The fact that handset exclusivity arrangements are created by contracts between private parties poses no legal obstacle. Like any other regulatory agency, the Commission has the power and the responsibility to change or invalidate contracts that effectively impose “unlawful” rates for regulated services, *see* *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353-55 (1956), or incorporate terms that otherwise disserve the public interest, *see* *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 344-45 (1956). The so-called *Mobile-Sierra* doctrine empowers the Commission to modify or abrogate contracts involving regulated entities to the extent that “the public interest so requires.” *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 709 (D.C. Cir. 2000) (*per curiam*); *accord, e.g.*, *BellSouth Telecom, Inc. v. MCI Metro Access Transmission Servs., LLC*, 425 F.3d 964, 969-70 (11th Cir. 2005). The Commission has decisively modified or invalidated private contracts whenever it finds that it must act in favor of the public interest. *See, e.g.*, *Western Union Tel. Co. v. FCC*, 815 F.2d 1495, 1501 & n.2 (D.C. Cir. 1987) (recognizing the Commission’s authority to “modify . . . provisions of private contracts when necessary to serve the public interest”); *In re Competition in the Interstate Interexchange Marketplace*, 10 FCC Rcd. 4421, 4422 n.15 (1995); *In re Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd. 5880, 5906 (1991). That power is not diminished by the presence of a contracting party or of activities not typically regulated by the Commission. “[T]he Commission does not exceed its authority simply because a regulatory action has . . . consequences” beyond the entities and activities that the Commission more routinely supervises. *Cable & Wireless v. FCC*, 166 F.3d 1224, 1230 (D.C. Cir. 1999). Intervention by the Commission is especially appropriate when it enables “an incumbent provider’s established customers to

consider taking service from a new entrant.” *In re* Expanded Interconnection with Local Tel. Co. Facilities, 9 FCC Rcd. 5154, 5208 (1994). The Commission should invoke these powers with respect to exclusivity arrangements between commercial wireless carriers and handset manufacturers.

B. The Commission Should Draw Upon Its Experience with Exclusivity Clauses for Telecommunications and Video Services in Real Estate Developments

The Commission has had extensive experience with a similarly destructive practice involving telecommunications and multichannel video programming delivery (MVPD) services in multiple tenant environments (MTEs) and multiple dwelling units (MDUs). The Commission ultimately banned exclusivity arrangements for video and telecommunications services in these real estate developments. The Commission’s orders that banned exclusive access contracts in commercial and residential real estate developments provide a valuable blueprint for the action that the Commission should now take against handset exclusivity agreements between device manufacturers and wireless service providers.

The Commission first addressed exclusive access contracts in *In re* Promotion of Competitive Networks in Local Telecommunications Markets, 15 FCC Rcd. 22,983 (2000) [hereinafter *Competitive Networks Order*]. At issue were contracts granting specific telecommunications carriers the exclusive right of access to tenants in multiple tenant environments. The Commission recognized how “an exclusive contract may essentially constitute a device” enabling the incumbent provider “to preserve existing market power” at the expense of “competition in the market for local telecommunications service.” *Id.* at 22,997-98. Exclusivity “erects a barrier preventing other

telecommunications firms from offering service to tenants in the building(s) covered by the contract.” *Id.* at 22,997. In circumstances “where new entrants face fixed costs or otherwise have costs characterized by increasing returns to scale, the existence of incumbent LEC exclusive contracts covering some buildings actually would make it more difficult for the entrants to serve other buildings economically.” *Id.* at 22,997-98. “[E]xclusive contracts for telecommunications service in commercial settings,” the Commission concluded, “impede the procompetitive purposes of the 1996 Act and appear to confer no substantial public benefits.” *Id.* at 23,000.

On a prospective basis, the Commission prohibited exclusive access contracts for telecommunications service in commercial MTEs. *See id.* The Commission reserved judgment and invited comment on exclusive access contracts in residential MTEs. *See id.* at 23,000, 23,052. The Commission also deferred action on existing exclusive access contracts, instead inviting comment on whether to terminate them immediately or, alternatively, to “phase out such provisions by establishing a future termination date.” *Id.* at 23,053. In so doing, however, the Commission reaffirmed its power, in an appropriate case where the threat to competition would warrant immediate action, to invalidate existing as well as future exclusivity arrangements. *See id.*

In 2007 the Commission revisited the issue of exclusive access contracts. It did so in the context of the provision of video services to multiple dwelling units (MDUs) and other real estate developments. *See Video Nonexclusivity Order*, 22 FCC Rcd. at 20,235.⁷ The Commission took action under section 628, whose purposes strikingly

⁷Ironically, the parties that most vociferously opposed video service provider exclusivity clauses in this 2007 proceeding included AT&T and Verizon, the very entities that use handset exclusivity arrangements to tighten their grip on the market for wireless carriage. In their capacity as competitive deliverers of multichannel video programming, AT&T and Verizon understood what small and rural wireless carriers are arguing in this context:

resemble those of the provisions that counsel Commission action against handset exclusivity arrangements. *See supra* Part III.A. “The purpose” of section 628, by its own terms, “is to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies.” 47 U.S.C. § 548(a); *see also In re* Implementation of Section 3 of the Cable Television Consumer Protection & Competition Act of 1992, 21 FCC Rcd. 15,087, 15,087 (2006) (confirming that the presence of “wireline cable competition” reduces MVPD prices by 17 percent). Section 628(b) accordingly prohibits “unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.” 47 U.S.C. § 548(b). Finding that “the harms” of exclusivity clauses favoring a single provider of video services “significantly outweigh the benefits,” the Commission condemned “cable operators’ use of exclusivity clauses in contracts for the provision of video services to MDUs” as “an unfair method of competition or an unfair act or practice proscribed by Section 628(b).” *Video Nonexclusivity Order*, 22 FCC Rcd. at 20,243-44 (citing 47 U.S.C. § 548(b)).

The Commission found three distinct categories of competitive harm. First, the Commission found that exclusivity clauses inflict their “greatest harm” by denying MDU

exclusivity arrangements, for handsets as for video services to multiple dwelling units, are discriminatory, anticompetitive practices that raise prices, destroy consumer choice, and retard innovation and that accordingly deserve to be banned by the Commission.

residents “another choice of MVPD service” and, consequently, denying those residents “the benefits of increased competition.” *Id.* at 20,244. Sheltered by its exclusivity clause, an incumbent video provider “would have no incentive to hold down its prices within the MDU.” *Id.* at 20,245. Nor would residents of the MDU have access to service from a competing video provider, “with potentially lower rates and better features than the incumbent’s.” *Id.*

Second, the Commission recognized that “a new provider of MVPD services . . . is likely to bring into MDU some satellite-delivered cable programming that the incumbent beneficiary of the exclusivity clause does not.” *Id.* The exclusion of the MVPD entrant would deprive MDU residents “the programming of their choice.” *Id.* The Commission took care to note the disproportionate impact “on minorities and low-income families (and on programmers specializing in programming oriented to those groups).” *Id.*

Finally, the Commission concluded that MVPD exclusivity defeats the competitive “‘triple play’ bundle of video, voice, and Internet access” that underlies a prevalent and highly successful marketing strategy in the rapidly converging markets for video, wireline, and broadband services. *Id.* Triple play promises, among other things, “increased deployment of fiber to American homes at lower cost per residence.” *Id.* Its success lies not only in its promise of “advanced telecommunications capability, but also a simplicity and efficiency that is proving to be highly attractive in the marketplace.” *Id.* at 20,246. According to the Commission, exclusivity clauses frustrate triple play on multiple levels. Would-be competitors lose access to the “many millions of households” living in MDUs. *See id.* at 20,245. Even more important, “exclusivity clauses deny

consumers . . . the benefits that could flow to them” while conferring “few, if any benefits on those consumers.” *Id.* These exclusivity clauses were fundamentally “unfair,” the Commission concluded, because they “deprive[] consumers residing in MDUs of the opportunity to choose a MVPD provider.” *Id.* at 20,249.

Quite critically, the Commission recognized that the harms flowing from exclusivity clauses may become aggravated over time. In other words, it is not enough to acknowledge current, static harms from exclusivity. The *dynamic* impact on competition and innovation may be even greater. A current MDU owner’s decision to “grant exclusivity to one MVPD based on the available choice of service providers at a given time” could “bar entry into the MDU by a more desirable but later-arriving MVPD.” *Id.* at 20,246. Insulated from competition by an exclusivity clause, an incumbent MVPD may perceive no “need to improve its service.” *Id.* Even the owner of an MDU might fail to notice the harm to its own interests; an MDU might easily fail to anticipate how “an exclusivity clause . . . bars entry by new providers that were not in the market when the clause was written.” *Id.*

The Commission also “reject[ed] arguments that exclusivity clauses mostly work to the benefit of MDU owners and residents.” *Id.* at 20,249. Point by point, the Commission refuted assertions that exclusive access, expressly designed to benefit the incumbent carrier, would somehow benefit consumers of telecommunications service.⁸

⁸The Commission wrote in relevant part:

First, . . . the person signing an exclusivity clause for a MDU may be a builder or manager whose interests do not coincide with those of the MDU’s residents, especially after a few years. Second, the cable operator may have induced the MDU owner to accept an exclusivity clause before any wire-based competitor was on the horizon, in which case there was no “competition for the MDU” at the time and no prospect of it in the future. Third, the exclusivity clause may be in “legalese” and in fine print and the MDU owner may be unaware of it. Fourth, the fact that a new entrant wants to serve the MDU undercuts any claim that only one wire-based provider can serve the building profitably – if

Exclusivity, the Commission noted, had done little besides deliver a captive source of revenue to the incumbent carrier. Revenue streams made possible by exclusive access clauses did not benefit MDU residents in the form of additional investments made by favored carriers. Worse still, exclusivity foreclosed emerging marketing strategies such as triple play, which would enable any provider, whether a new entrant or the incumbent, to generate additional revenue. Indeed, the very presence of willing competitors “undercuts any claim that only one . . . provider can serve the [market] profitably.” *Id.* at 20,250. The Commission succinctly summarized its reasons for “conclud[ing] that exclusivity clauses generally do not benefit MDU residents”:

[T]he best results for consumers come from preserving their ability to play an active role in making an individual choice rather than allowing cable operators using exclusivity clauses to foreclose individual choice. In addition, . . . exclusivity clauses tend to insulate the incumbent from any need to improve its service.

Id. The same pair of related considerations – preserving consumer choice and eliminating incumbent protections against competitive pressure – counsels a comparable skepticism toward exclusivity in handset manufacturing arrangements.

The Commission found that exclusivity clauses foreclosing competition for video services in MDUs were sufficiently harmful to warrant an immediate ban on “both the enforcement of existing exclusivity clauses and the execution of new ones.” *Id.* at

new entry would be unprofitable, it is unlikely that the new entrant would want to enter. Fifth, there is no evidence in the record, . . . that incumbent MVPD providers couple exclusivity clauses with significant new investments that they do not make elsewhere, such as in states whose laws prohibit exclusivity. Sixth, . . . the triple play, which offers a provider revenue from three services, reduces any need for exclusivity that it may have had in the past, when MVPD revenue was the only way it could recover its investment. Finally, other agreements between incumbent MVPDs and MDU owners, perhaps providing for marketing exclusivity or bulk discounts, can provide benefits similar to those alleged for exclusivity clauses without causing the latter clauses' entry-foreclosing harms to consumers.

Video Nonexclusively Order, 22 FCC Rcd. at 20,249-50 (footnotes omitted).

20,252. Cognizant that leaving “exclusivity clauses in effect would allow the vast majority of the harms caused by such clauses to continue for years,” the Commission concluded that it was “strongly in the public interest to prohibit [all exclusivity] clauses from being enforced.” *Id.* Indeed, a contrary approach would allow “[t]hose harms [to] continue indefinitely in the cases of exclusivity clauses that last perpetually or contemplate automatic renewal.” *Id.* The Commission rebuffed all calls to limit the scope of its remedy, including a temporary delay in enforcement and exceptions favoring certain carriers or real estate developments, with a broad declaration of its “reluctan[ce] to grant any communications companies an artificial period of immunity from pro-competitive regulation during which the recovery of their investment is guaranteed.” *Id.* at 20,254. After all, the Commission observed, “companies in communications markets regularly invest billions of dollars without any such guarantees.” *Id.*

The Commission recognized that its ban on exclusivity clauses would “prohibit the continuation and proliferation of an anticompetitive . . . practice that has erected a barrier to the provision of competitive video services.” *Id.* at 20,257. The ban, according to the Commission, would “also . . . promote the development of new technologies that will provide facilities-based competition to existing cable operators.” *Id.* Absent the Commission’s intervention, exclusivity clauses would have enabled incumbent operators to starve competitive MVPDs of revenue “by inhibiting [their] ability to market . . . package[s] of services that consumers demand and reducing the revenues [they] need[] to support investment in new and innovative services.” *Id.* Worse still would be these clauses’ destructive impact on consumers: “once a MDU owner is ‘locked’ into an exclusivity clause, residents are prevented from choosing alternative services they might

prefer – on the basis of price, quality, and innovative and technologically advanced service offerings.” *Id.* at 20,258 (internal quotation marks omitted).

In 2008, the Commission revisited the issue of exclusive agreements to provide telecommunications services in multiple tenant environments. *See In re Promotion of Competitive Networks in Local Telecommunications Markets*, 23 FCC Rcd. 5385 (2008) [hereinafter *Telecommunications Nonexclusivity Order*]. The 2000 *Competitive Networks Order*, 15 FCC Rcd. at 22,983, as discussed above, had “prohibited carriers from entering into contracts that restrict or effectively restrict owners and managers of commercial MTEs from permitting access by competing carriers.” *Telecommunications Nonexclusivity Order*, 23 FCC Rcd. at 5386. The new order extended the ban to residential MTEs, on the reasoning that “exclusive agreements to provide telecommunications services to residential customers in MTEs harm competition and consumers without evidence of countervailing benefits.” *Id.*

The Commission adopted the reasoning of the *Video Nonexclusivity Order*. It concluded that telecommunications exclusivity arrangements for residential MTEs “have the same harmful effects on the provision of triple play services and broadband deployment as discussed in the *Video Nonexclusivity Order*, and pose just as much of a barrier to competition where they are attached to the provision of telecommunications services as they are to the provision of video services.” *Id.* at 5388 (footnote omitted). By prohibiting or discouraging “consumers from seeking alternative . . . providers” of telecommunications services, exclusivity clauses “limit[] consumer choice and competition,” “adversely affect consumers’ rates,” and undermine “quality, innovation, and network redundancy.” *Id.* In the telecommunications market as in the video market,

the Commission found “no evidence of benefits to competition or consumer welfare from the use of exclusive contracts.” *Id.* at 5389.

The Commission characterized “a carrier’s execution or performance” of an exclusivity clause for telecommunications service to be “an unreasonable practice” under section 201(b) of the Communications Act. *Id.* at 5391. As it did in the *Video Nonexclusivity Order*, the Commission elected to “immediately prohibit[] the enforcement of [telecommunications exclusivity] provisions” rather than “phas[e] them out or wait[] until contracts expire and are replaced by contracts without exclusivity provisions.” *Id.* at 5390. “[T]he prohibition of exclusive contracts in the provision of telecommunications services to residential MTEs,” the Commission concluded, “effects the same policy goals” as the commercial MTE ban imposed by the *Competitive Networks Order*: “facilitating competitive entry, lower prices, and more broadband deployment.” *Id.* at 5391.

The Commission’s trilogy of orders regarding telecommunications and video services in multiple tenant environments and multiple dwelling units – the *Competitive Networks Order* of 2000, the *Video Nonexclusivity Order* of 2007, and the *Telecommunications Nonexclusivity Order* of 2008 – outlines a cogent, persuasive approach to a different set of exclusivity agreements: exclusivity arrangements that limit highly coveted, technologically advanced handsets to certain wireless carriers. In the future rulemaking proceeding contemplated by the *Verizon-ALLTEL* order and the *Handset Exclusivity Rulemaking Notice*, the Commission should ban handset exclusivity arrangements according to rationales comparable to those articulated in the MTE/MDU trilogy.

A ban on handset exclusivity arrangements would also find support from the Competition Council of France. In December 2008, the Competition Council invalidated Apple's exclusive arrangement to supply the iPhone to Orange (formerly known as France Telecom). See Ben Hall, *French watchdog cancels iPhone contract*, Financial Times, Dec. 17, 2008. In that proceeding, Bouygues Telecom persuasively "argued that 'smartphones' like the iPhone were driving the growth of the mobile market and that Apple's deal in France excluded other operators from that growth." *Id.* "The Competition Council also concluded that an exclusive sales agreement was against consumer interests because competition between operators was likely to encourage them to provide bigger subsidies for handsets." *Id.*

C. Conclusion: The Commission Should Liberate the Wireless Industry from Handset Exclusivity Arrangements

The wireless industry today is competitive, but it perches precariously on a crucial turning point in technology and the economic relationships that connect consumers with creators of applications and content. "[A]pproximately 284 million people, or 99.6 percent of the total U.S. population," have access to wireless telephone service from "one or more different operators." *13th CMRS Competition Report, supra*, at ¶ 40. "[A]pproximately 272 million people, or 95.5 percent of the total U.S. population, have three or more different operators offering mobile telephone service in the census blocks in which they live, while approximately 258 million people, or 90.5 percent of the U.S. population, live in census blocks with four or more mobile telephone operators competing to offer service." *Id.* at ¶ 41. These robust figures reflect decades of carefully crafted regulatory policy, designed to move the United States and its consumers from

almost exclusive reliance on a single carrier's narrowband, wireline platform, to a choice of advanced services over multiple networks operated by competing carriers. The control that the largest wireless operators now exert over handsets and device manufacturers threatens to unravel those decades of regulatory progress. Unless the Commission decisively intervenes, consumer demand for advanced handsets may trigger an anticompetitive reconcentration of eyeballs, minutes, and megabytes among four, three, or perhaps even two major carriers.

Handset exclusivity arrangements corrode the fundamental principles that have given rise to competition in the wireless industry: consumer choice, competitive and technological neutrality under law, evenhanded regulation, and a culture of technological innovation that is productive to the very extent that it is unpredictable. By definition – by their very intent and design – handset exclusivity arrangements eliminate all choices but one in the market for the “must-have” devices that are now driving consumer demand and preferences in the radically changed wireless industry. To argue that consumers have a nominal choice among these devices – for example, the iPhone and other touchscreen handsets such as the Samsung Instinct – is effectively to concede the market for wireless carriage to no more than four large carriers. Sheltered by handset exclusivity agreements, these carriers have reduced or even eliminated the competitive pressure to lower prices, improve service, and introduce new, advanced technologies. Advanced handsets and applications taking full advantage of mobile broadband networks are to the wireless industry as the triple play of video, broadband, and telephony has been in market for facilities-based delivery of telecommunications and information services to residential consumers.

There simply are no countervailing consumer benefits from handset exclusivity arrangements. Analysts have long recognized that carrier control over handsets has created the greatest bottleneck to innovation in the design and deployment of handheld devices and software optimized for those devices. Rural and small wireless carriers have kept pace with, and in some cases have surpassed, their larger rivals in building high-speed networks. Those investments will go for naught (or at best will be acquired at cents on the dollar by larger competitors) if rural and small carriers cannot break their nationwide rivals' stranglehold on the devices that most consumers want as their point of contact with wireless telephony, text and multimedia messaging, and online content. The larger carriers are indeed deriving revenue from their handset exclusivity arrangements, but those dollars are not reflected in technological advances or other changes that benefit consumers.

The large carriers have also attempted to divert the Commission's attention by characterizing the RCA petition as a plea for "generic" handsets. That is simply untrue. No opponent of handset exclusivity arrangements has characterized this petition as a request for a Commission rule requiring equipment manufacturers to design generic devices stripped of features unique to any individual operator's wireless network. Rather, all that the petition seeks is a ruling from the Commission that wireless carriers and device manufacturers may neither enforce nor execute any exclusivity arrangement that handcuffs one handset to a specific wireless carrier. All carriers should be able to negotiate handset modifications specific to the technological specifications of their networks and, even more critically, to make all handsets available for purchase by their customers.

The increasing reliance of consumers on wireless platforms makes Commission action all the more urgent. In the immediate wake of the passage of the Telecommunications Act of 1996, the Commission recognized how growing consumer reliance “on CMRS as a partial or complete substitute for wireline service” made it “increasingly important . . . to preserve the basic relationship between carriers and customers enshrined in sections 201 and 202.” *PCS Forbearance Order*, 13 FCC Rcd. at 16,870. Today, roughly one sixth – 16 to 18 percent – of American households are entirely wireless. See *13th CMRS Competition Report*, *supra*, at ¶¶ 228-30. The competitive implications of the RCA’s call for Commission action against handset exclusivity arrangements will widen further as advanced handsets enable consumers to treat wireless service as a substitute for broadband access by other means. Banning handset exclusivity arrangements would neither “chill[] innovative services and plans” nor induce carriers to “speculat[e] about the legal ramifications of offering innovative service packages and prices.” *PCS Forbearance Order*, 13 FCC Rcd. at 16,871. Ultimately, upholding the Communications Act’s commitment to competition and to reasonable, nondiscriminatory practices is entirely consistent with the Act’s simultaneous support for innovation and with carriers’ interest in winning business through new services and advanced technology. Any action (or inaction) by the Commission in response to handset exclusivity arrangements will have a profound *dynamic* impact on the future of communications and innovation policy in the United States. I sincerely hope that the Commission will take decisive action against handset exclusivity arrangements and thereby inspire “an unprecedented flowering of innovation.” *United States v. Western Elec. Col.*, 890 F. Supp. 1, 9 (D.D.C. 1995).

Respectfully submitted,

/s/ [filed electronically]

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CERTIFICATE OF SERVICE

I, Linda J. Evans, hereby certify that on this 2nd day of February, 2009, copies of the foregoing COMMENTS were sent by e-mail, in pdf format, to the following:

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